BLEED THROUGH

APPENDIX I

Opinion of Ward, J.
396 F. Supp. 450 (S.D.N.Y. 1975)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Civ. 646 R.J.W.

BARBARA GIRARD,

Plaintiff,

against

94TH STREET AND FIFTH AVENUE CORPORATION, LAWRENCE WILKINSON, JOHN H. STOOKEY and THOMAS E. MURRAY,

Defendants.

Appearances

BALLON, STOLL & ITZLER, Esqs.
Attorneys for Plaintiff
KENNETH S. KNIGIN, Esq.
HOWARD D. RESSLER, Esq.
Of Counsel

SHEA GOULD CLIMENKO KRAMER & CASEY, Esqs.
Attorneys for Defendants
MARTIN I. SHELTON, Esq.
JAMES H. SCHUYLER, Esq.
Of Counsel

WARD, J.

Defendants, 94th Street and Fifth Avenue Corporation ("the corporation") and the members of its board of directors, individually, move to dismiss the complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P., for failure to state a claim upon which relief can be granted, or in the alternative, for summary judgment pursuant to Rule 56, Fed. R. Civ. P., on grounds of *res judicata*. Since matters outside the pleadings have been presented to and not excluded by the Court, the Rule 12(b)(6) motion will be treated as one for summary judgment.

In 1968, during their marriage, plaintiff's former husband purchased shares of capital stock of the corporation and became owner, for the term beginning January 15, 1968 and ending May 31, 1981, of the proprietary lease to the fourth floor of 1125 Fifth Avenue, New York. Thereafter, plaintiff and her husband entered into a separation agreement by which the latter assigned to plaintiff his right, title and interest in the capital stock and proprietary lease, and vacated the premises. The corporation was subsequently notified of the assignment. Plaintiff requested that she be recognized as the owner of the stock and as the lawful tenant of the premises. The board of directors, giving no reason, refused to consent to the assignment of the lease and rejected the demand by plaintiff to transfer the stock on its books to her.

Plaintiff commenced an action against the corporation in the Supreme Court of the State of New York, County of New York seeking a declaratory judgment that the corporation's refusal was arbitrary, capricious and unreason-

BLEED THROUGH

able, and a court order compelling it to transfer the stock on its books to her and to consent to the assignment of the proprietary lease. The corporation moved for summary judgment, which was granted. The Court held that by the terms of the proprietary lease the corporation had the right to refuse to consent to the transfer of the lease to plaintiff for any reason it deemed satisfactory except, as the Court noted parenthetically, for reasons prohibited by civil rights laws. The Appellate Division, First Department, affirmed the order and judgment. Plaintiff's motion for leave to appeal to the Court of Appeals was denied.

Claiming that her requested ownership transfer was rejected for reasons prohibited by the Fourteenth Amendment and the civil rights laws derived therefrom, plaintiff instituted her present action in federal court. She alleges that defendants have violated 42 U.S.C. §1982,[1] by refusing to consent to the requested assignment solely because she is female. She also alleges under 42 U.S.C. §1985(3)[2] that

1. 42 U.S.C. §1983 reads:

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. 42 U.S.C. §1985(3) reads:

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities

(footnote continued on next page)

defendants have conspired to deprive her of her procedural due process rights by refusing to provide her an opportunity to be heard at any discussion pertaining to her interests by the board of directors of the corporation, and have conspired to deprive her of substantial property rights in the subject premises solely because she is a female. In addition, she alleges violation of the New York Human Rights Law, New York Executive Law §296(5)(a)(1) (1972).[3] Plaintiff seeks judgment directing that the cor-

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under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

3. New York Human Rights Law, New York Executive Law §296(5)(a)(1) reads:

5. (a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:

(1) To refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color, national origin or sex of such person or persons.

BLEED THROUGH

poration and the members of its board of directors recognize her as the lawful owner of the shares of stock and proprietary lease in the premises, and enjoining them from interfering with her peaceful possession of the premises.

Defendants contend that plaintiff has failed to state an adequate federal cause of action. Specifically, they argue that her §1983 claim must be dismissed for failure to set forth facts showing any deprivation under color of state law of any right, privilege or immunity and that her §1985 (3) claim must be dismissed for failure to establish a conspiracy cognizable under the statute. Alternatively, defendants contend, if plaintiff states a sufficient claim for relief on either ground, the doctrine of *res judicata* precludes their assertion here since she has already litigated this controversy in state court, where she had full opportunity to assert all claims.

28 U.S.C. §1331(a) gives this Court jurisdiction to hear the federal questions raised in plaintiff's complaint since the enforcement of rights arising under the Constitution and laws of the United States is basic to the relief she seeks and the claims she alleges are neither insubstantial nor frivolous. *Bell* v. *Hood*, 327 U.S. 678, 683 (1945); *Moore* v. *Central R. Co. of New Jersey*, 185 F.2d 369, 371 (2d Cir. 1950). Jurisdiction is not defeated by the possibility that the complaint might fail to state a cause of action. That question must be decided after, and not before, the Court assumes jurisdiction. *Bell* v. *Hood, supra* at 682; *Olson* v. *Board of Education of Union Free School District, Malverne, N.Y.*, 250 F. Supp. 1000, 1004 (E.D.N.Y. 1966).

To state a claim for relief under 42 U.S.C. §1983, a plaintiff must show (1) a deprivation of rights, privileges

or immunities secured by the Constitution and laws of the United States, and (2) causation of such deprivation by a person acting under color of state law. "In cases under §1983, 'under color of law' has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." *United States* v. *Price*, 383 U.S. 787, 794 n.7 (1966) (citing cases). An action, especially under the Civil Rights Act, should not be dismissed at the pleading stage unless it appears to a certainty that plaintiff is entitled to no relief under any set of facts which could be proved in support of her claim, *Escalera* v. *New York City Housing Authority*, 425 F.2d 853, 857 (2d Cir. 1970). Nevertheless, plaintiff's §1983 claim must be dismissed for failure to allege facts sufficient to support a finding of "state action."

Citing *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), plaintiff argues that the requisite state action is present to support her §1983 claim because the courts of the State of New York have ratified and enforced the provision in the proprietary lease vesting the board of directors with near absolute authority to reject requested ownership transfers. While *Shelley* v. *Kraemer* does establish that judicial enforcement of a private discriminatory contract may constitute state action for purposes of the Fourteenth Amendment, giving rise to a claim under civil rights laws, the state judicial action involved in *Shelley* is clearly distinguishable from that presented here. In *Shelley* discriminatory purposes of a racially restrictive covenant were secured only by reason of the state court's imprimatur. The state had thus provided "the full coercive power of government

BLEED THROUGH

to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners [were] willing and financially able to acquire and which the grantors [were] willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants [was] the difference between being denied rights of property available to other members of the community and being awarded full enjoyment of those rights on an equal footing." 334 U.S. at 19. However, the Court noted, "the restrictive agreements standing alone cannot be regarded as violative of any right guaranteed to petitioners by the Fourteenth Amendment . . . That Amendment erects no shield against merely private conduct, however, discriminatory or wrongful." 334 U.S. at 13.

In the instant case there is no restrictive covenant contained in the proprietary lease which expressly prohibits transfers of ownership on the basis of sex. The lease merely provides that no assignment by a lessee shall be effective against the lessor without its prior consent. The Supreme Court of the State of New York upheld the validity of this provision and acknowledged the broad power of the board of directors to refuse to consent to requested assignments for any reason deemed satisfactory to it except those prohibited by civil rights laws. Even if the board's refusal was motivated by a constitutionally impermissible purpose, any deprivation suffered by plaintiff as a consequence was completed prior to the state court proceedings. Unlike in *Shelley,* the action by the state court here did not effectuate a discriminatory purpose which could not have been secured but for its decision.

Finding plaintiff's reliance on *Shelley* v. *Kraemer* misplaced, this Court must determine whether plaintiff has

alleged facts sufficient to establish the necessary "state action" to support her §1983 claim. Plaintiff argues no other nexus between the state and defendants' allegedly discriminatory conduct but the state court's decision.

In order to subject conduct that is formally private to the limitations of §1983 and the constitutional amendments, it must be shown (1) that the degree of state involvement with the private institution is "significant," (2) that the state's involvement is with the activity that caused the injury (the nexus requirement), and (3) that the state's involvement aids, encourages or connotes approval of the complained of activity. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 (1971); *Barrett* v. *United Hospital*, 376 F. Supp. 791, 797 (S.D.N.Y. 1974); *see also, Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1975). However, our circuit recognizes a double "state action" standard: "A less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims." *Barrett* v. *United Hospital, supra* at 797; *Jackson* v. *The Statler Foundation*, 496 F.2d 623, 628-29 (2d Cir. 1974) (citing cases). The *Barrett* court noted that the rationale behind the exception for cases involving racial discrimination may make it equally applicable to cases involving sex or age discrimination. 376 F. Supp. 797 n.26.

Since plaintiff bases her §1983 claim on alleged sex discrimination, this Court will depart from the three-pronged state action test and more closely scrutinize the state court's involvement to determine whether the alleged discrimination by defendants was impregnated with governmental approval. Under this stricter standard, "indirect governmental participation in the management of an organization

BLEED THROUGH

is persuasive evidence of the existence of 'state action' where the participation is both substantial and other than neutral." *Jackson* v. *The Statler Foundation*, 496 F.2d 623, 635 (2d Cir. 1974). Upon review of the evidence presented, it cannot be said that the action of the state court here was either "substantial" or "other than neutral." The state has merely provided a forum to determine the rights of the parties; it has no interest whatever in the outcome of the private litigation. *See, Stevens* v. *Frick*, 372 F.2d 378, 381 (2d Cir. 1967) (citing cases). The purported discrimination was not secured only by reason of the state court's decision. *Cf., Shelley* v. *Kraemer*, 334 U.S. 1 (1948). To say that an open courthouse door constitutes "state action" is to demean the judicial process. Such a conclusion would provide future litigants an opportunity to raise a §1983 claim, based on conclusory allegations of discrimination, every time a state court construed a contractual provision, nondiscriminatory on its face, against the litigant's interests. Accordingly, plaintiff's §1983 claim is dismissed for failure to establish the requisite element of "state action."

Defendants next challenge the sufficiency of plaintiff's §1985(3) claim. In *Griffin* v. *Breckenridge*, 403 U.S. 88 (1970), the Supreme Court set the framework for an adequate complaint under §1985(3). A complaint must allege (1) a conspiracy between two or more persons for the purpose of depriving any person or class of persons of the equal protection of the laws, or of equal privilege and immunities under the law, and (2) an act by one of the conspirators in furtherance of the object of the conspiracy whereby another person was (a) injured, or (b) deprived

of exercising any right or privilege of a citizen of the United States.

Existence of a conspiracy under §1985(3) presents a question of fact. *Crawford* v. *City of Houston, Texas,* 386 F. Supp. 187, 192 (S.D. Texas 1974). Viewing the complaint in a light most favorable to plaintiff, and accepting the facts alleged as true, 2A Moore's Federal Practice ¶12.08 (2d ed. 1974), the Court nevertheless finds that plaintiff has failed to allege facts sufficient to constitute a conspiracy within the meaning of §1985(3) and, therefore, her §1985(3) claim must be dismissed.

The conduct challenged by plaintiff's §1985(3) claim is the action of the individual defendants rejecting her requested ownership transfer taken while acting in their official capacity as directors of the corporation, which she alleges constitutes a conspiracy to deprive her of her civil rights and substantial property rights solely because she is female.

The lease agreement in controversy stipulates that the directors must consent to all proposed assignments of ownership before they are effective against the lessor. While plaintiff specifically states that the board of directors controls the corporation, she never alleges that the directors acted outside their official capacity in reaching their purported discriminatory decision. Plaintiff, thus, seeks to extend §1985(3) to discriminatory business decisions participated in by members of one business entity. *Cf., Baker* v. *Stuart Broadcasting Company,* 505 F.2d 181 (8th Cir. 1974). In dealing with this precise issue, the Seventh Circuit in *Dombrowski* v. *Dowling,* 459 F.2d 190, 196 (7th Cir. 1972) stated:

BLEED THROUGH

> . . . If the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by this statute.

Here, the cooperative corporation established the medium, its board of directors, through which it acted in ratifying assignments of ownership. Although the decision plaintiff challenges reflected the collective judgment of "two or more persons," the decision cannot be considered the product of a conspiracy when the board was merely carrying out the corporation's managerial policy. Following the rule stated in *Nelson Radio & Supply Co.* v. *Motorola,* 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied,* 345 U.S. 925 (1953), when acting in an official capacity, "the acts of the agent are the acts of the corporation. . . . A corporation cannot conspire with itself anymore than a private individual can." *See also, Cole* v. *University of Hartford,* 43 U.S.L.W. 2418 (D. Conn. Apr. 15, 1975). That these individuals are, coincidentally, shareholders, tenants and occupants of apartments in the building owned by the defendant corporation, is irrelevant to this Court's determination of a §1985(3) conspiracy, for plaintiff has not alleged that these directors were actuated by any independent personal state in achieving the corporation's purported illegal objective. *See, Cohen* v. *Illinois Institute of Technology,* 384 F. Supp. 202, 205 (N.D. Ill. 1974). Accordingly, plaintiff's §1985(3) claim is dismissed for failure to allege a conspiracy cognizable under the statute.

Having concluded that plaintiff's federal claim must be dismissed for failure to state a cause of action, this

Court, in its discretion, will also dismiss her pendent state claim. Plaintiff will suffer minimal inconvenience by the dismissal of her state claim at a point early in the course of this litigation. Following the Supreme Court's ruling in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966),

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims must be dismissed as well.

This Court's determination that plaintiff's federal claims are inadequate is expressly limited to the finding that she has failed to establish the necessary "state action" required by §1983 or an actionable conspiracy required by §1985(3). Thus, this Court does not reach the substantive issue of sex discrimination.

Since this Court has determined that plaintiff has failed to state a federal claim upon which relief may be granted, the Court need not reach the question of the *res judicata* effect of the prior state court judgment.

For the foregoing reasons, defendants' motion for summary judgment is granted.

Settle order on notice.

Dated: June 30, 1975

/s/ Robert J. Ward
U. S. D. J.

BLEED THROUGH

APPENDIX II

Opinion of Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 372—September Term, 1975.

(Argued October 1, 1975 Decided January 13, 1976.)

Docket No. 75-7443

BARBARA GIRARD,

Plaintiff-Appellant,

v.

94TH STREET AND FIFTH AVENUE CORPORATION, LAWRENCE WILKINSON, JOHN H. STOOKEY and THOMAS E. MURRAY,

Defendants-Appellees.

Before:

WATERMAN, OAKES and MESKILL,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Robert J. Ward, *District Judge*, granting summary judgment to de-

fendants dismissing plaintiff's 42 U.S.C. §1983 claim for lack of "state action" and plaintiff's 42 U.S.C. §1985(3) claim on the ground that defendants did not enter into the requisite conspiracy in refusing to approve of an assignment of a lease or a transfer of stock. Plaintiff's pendent state claim was also dismissed.

Affirmed.

O. JOHN ROGGE, New York, New York (Ballon, Stoll & Itzler, New York, New York, of counsel), *for Appellant.*

MARTIN I. SHELTON, New York, New York (Geoffry R. Handler; James H. Schuyler, Shea, Gould, Climenko, Kramer & Casey, New York, New York, of counsel), *for Appellees.*

MESKILL, *Circuit Judge*:

This is an appeal from an order of the Unted States District Court for the Southern District of New York, Robert J. Ward, *District Judge,* granting defendants' motion for summary judgment by dismissing plaintiff's 42 U.S.C. §1983[1] claim for failure to establish the necessary

1. 42 U.S.C. §1983 reads:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

BLEED THROUGH

"state action," dismissing plaintiff's 42 U.S.C. §1985(3)[2] claim because plaintiff did not establish the actionable "conspiracy" required, and dismissing plaintiff's pendent state claim. *Girard* v. *94th Street and Fifth Avenue Corp.*, 396 F.Supp. 450 (S.D.N.Y., 1975).

In 1968, during their marriage, plaintiff's former husband purchased 497 shares of stock from 94th Street and Fifth Avenue Corporation ("the corporation"), the owner and manager of a cooperative apartment building in New York City. As part of that transaction, Mr. Girard obtained a proprietary lease to the fourth floor of the building. The Stock Certificate contains a restriction that the shares represented thereby may be sold only to the corporation or to an assignee of the proprietary lease after compliance with certain provisions of the proprietary lease, which required that Mr. Girard obtain the written consent of the board of directors before any assignment of his interest in the apartment could become effective; in the event of a violation of this restriction, the corporation could terminate the lease.

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2. The pertinent part of 42 U.S.C. §1985(3) reads:

> "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

In 1973, as part of a separation agreement between plaintiff and her husband, Mr. Girard assigned his interest in the apartment to plaintiff in lieu of alimony; the separation agreement was incorporated into the judgment of divorce granted later that year. No consent to assignment from the board of directors had been solicited or received. When plaintiff subsequently requested that she be recognized as the lawful stockholder and tenant, the board of directors, giving no reason, refused its consent, rejected plaintiff's demand that the stock be transferred from Stephen Girard to Barbara Girard and refused to register the transfer on the books of the corporation.

Plaintiff then initiated suit ("Action #1") in the Supreme Court of New York seeking both a declaration that the corporation's refusal was arbitrary, capricious, and unreasonable and an order compelling the corporation to transfer the stock on its books to her and to consent to an assignment of the lease. The corporation commenced its own action ("Action #2") for possession and eviction because of the unauthorized assignment and the failure to pay maintenance costs. The state court granted defendant's motion for summary judgement in Action #1, finding that the consent provision of the lease was enforceable under state law and that "the cooperative apartment corporation had the right to refuse to consent to the transfer of the lease to plaintiff for any reason deemed satisfactory to it (except, of course, those prohibited by the Civil Rights Laws)." The Appellate Division, First Department, affirmed the order and judgment. 46 App.Div.2d 848, 362 N.Y.S.2d 405 (1974). Plaintiff's motion for leave to appeal to the New York Court of Appeals was denied.

BLEED THROUGH

Plaintiff then instituted this suit, alleging that the corporate defendant and the individual defendants, as its officers and board of directors, violated her rights under 42 U.S.C. §1983 by refusing to consent to the assignment of the lease solely because she is female. She also alleged that defendants conspired to deprive her of her civil rights because of her sex, a violation of 42 U.S.C. §1985(3). Finally, plaintiff alleged that defendants violated New York Executive Law §296(5)(a)(1) (1972).[3] Plaintiff sought a declaration of her rightful ownership of the stock and proprietary lease and an injunction preventing any wrongful interference with her peaceful possession of the premises.

I. *Plaintiff's Claim Under 42 U.S.C. §1983*

For the plaintiff to prevail under 42 U.S.C. §1983 she must prove that the defendant, under color of any statute, ordinance, regulation, custom or usage of any state, has deprived her of a right secured by the Constitution and laws of the United States. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 150 (1970). An act chargeable to the state is a necessary element to be pleaded and proved. Plaintiff asserts that the judgment rendered by the state court after Action #1 and Action #2 had been consolidated constitutes state action for §1983 purposes.

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3. New York Executive Law §296(5)(a)(1) reads:

"It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:

(1) To refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color, national origin or sex of such person or persons."

Certainly a state court judgment can be state action. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). We must decide if within the meaning and scope of §1983 the state court's enforcement of the lease provision is a deprivation by state action of a right secured to plaintiff by that statute and the Constitution. In *Shelley* v. *Kraemer, supra*, 334 U.S. at 4, the Supreme Court defined the question before it as "the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property." The white seller in that case had agreed to sell property to a black purchaser contrary to an agreement among property owners. Another owner sought to prevent the transfer by seeking enforcement of the agreement through court action. While stating that the private restrictive agreement itself did not violate Fourteenth Amendment rights, where the purpose of the agreements were secured only by judicial enforcement, the state was a participant within the meaning of the Fourteenth Amendment. *Shelley* v. *Kraemer, supra*, 334 U.S. at 13. The posture of the present case is significantly different from the situation in *Shelley*, however. The contested provision in *Shelley* was racially discriminatory on its face. The lease provision in question here, requiring consent of the board of directors before transfer is effective, can only be described as neutral; there is no suggestion of any prohibition of transfer of ownership on the basis of sex.

Summarizing prior holdings dealing with the state action concept, the Supreme Court has stated that "where the impetus for the discrimination is private, the State must

BLEED THROUGH

have 'significantly involved itself with invidious discriminations,' . . . in order for the discriminatory action to fall within the ambit of the constitutional prohibition." *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 (1972). This Court has recognized the existence of a "double standard" of review for state action. In cases involving racial discrimination, a particularly offensive class-based discrimination, the court has used a "less onerous" test than for other claims. See *Jackson* v. *Statler Foundation*, 496 F.2d 623, 629 (2 Cir. 1974); *Weise* v. *Syracuse University*, 522 F.2d 397 (2d Cir. 1975); *Barrett* v. *United Hospital*, 376 F.Supp. 791, 797 (S.D.N.Y., 1974). In *Weise* v. *Syracuse University, supra*, 522 F.2d at 406, the court applied this less rigorous standard to a claim of sex discrimination, although the court was careful to note that it was not necessary to put sex discrimination in the same category as race discrimination in that case in order to do so.

Even applying this less burdensome standard, the district court below found that the state's participation here was solely to provide a disinterested forum. *Girard* v. *94th Street and Fifth Avenue Corp., supra*, 396 F.Supp. at 455. See also *Stevens* v. *Frick*, 372 F.2d 378, 381 (2 Cir. 1967). In *McGuane* v. *Chenango Court Inc.*, 431 F.2d 1189, 1190 (2 Cir. 1970), *cert. denied*, 401 U.S. 994 (1971), this Court noted that "[n]either, despite some language in *Shelley* v. *Kraemer* . . . can state action be found in New York [sic] providing defendant with the same right to secure the eviction of a tenant by a proceeding in its courts that it gives to almost all landlords; the one thing now almost universally agreed is that such a rationale for that land-

mark decision would be altogether too far-reaching." Since it cannot be said that the state's involvement in this case approves[4] the allegedly discriminatory conduct, we affirm the dismissal by the district court of the §1983 claim.

II. *Plaintiff's Claim Under 42 U.S.C. §1985(3)*

In 1971 the Supreme Court, in *Griffin* v. *Breckinridge*, 403 U.S. 88, 104 (1971), held that §1985(3) reached certain private conspiracies to deprive others of their legal rights. A legally sufficient §1985(3) complaint must aver a conspiracy between two or more persons intended to deprive any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the law and an act by one of the conspirators in furtherance of the conspiracy which injured another person or deprived him of exercising any right or privilege of a citizen of the United States. See *Griffin* v. *Breckinridge*, *supra*, 403 U.S. at 102-103; *Cameron* v. *Brock*, 473 F.2d 608, 610 (6 Cir. 1973).

Plaintiff argues that her complaint satisfies the threshold requirement of a conspiracy between two or more persons. She has charged both a corporate defendant and individual defendants who constitute the officers and entire

4. Indeed the state recently has enacted civil rights legislation which specifically prohibits cooperatives from refusing to consent to transfers because of sex. New York Civil Rights Law §19-a(1) reads:

> "No corporation formed for the purpose of the cooperative ownership of real estate within the state shall withhold its consent to the sale or proposed sale of certificates of stock or other evidence of ownership of an interest in such corporation because of the race, creed, national origin, or sex of the purchaser."

BLEED THROUGH

board of directors with conspiring to deprive her of her civil rights because of her sex; the individual defendants are alleged to "wholly dominate, operate and control" all of the business and financial affairs of the corporation. Plaintiff claims that as part of the conspiracy, the defendants advised the president and board of directors to deny plaintiff continued occupancy of the premises, refused to permit her to appear at any meeting of the board, refused to provide her with minutes of the meetings, rejected any payments offered or any guarantee of her debt, harassed plaintiff by commencing legal proceedings of eviction and maliciously telephoned her at unreasonable hours to harass and annoy her. Defendants contend that no conspiracy can exist in this case since the corporation's decisions were formulated and carried out by its board of directors, the individual defendants, all of whom acted solely within their official capacities. Accepting plaintiff's allegations as true, the district court found that plaintiff failed to allege facts sufficient to constitute a conspiracy within the meaning of §1985(3). *Girard* v. *94th Street and Fifth Avenue Corp., supra,* 396 F.Supp. at 455. Decisions in this and other circuits fully support the district court's conclusion.

In *Dombrowski* v. *Dowling,* 459 F.2d 190 (7 Cir., 1972), plaintiff alleged that a realty corporation and its employee denied him rental space because many of his clients were members of minority groups. Noting that only one firm was involved and that the individual defendant acted within the scope of his authority as agent for that firm, the Court of Appeals for the Seventh Circuit held that

> ". . . the statutory requirement that 'two or more persons . . . conspire . . .' is not satisfied by proof that a

> discriminatory business decision reflects the collective judgment of two or more executives of the same firm . . . ." 459 F.2d at 196.

Accord, Baker v. *Stuart Broadcasting Company,* 505 F.2d 181, 183 (8 Cir. 1974); *Fallis* v. *Dunbar,* 386 F.Supp. 1117, 1121 (N.D. Ohio, 1974); *Cohen* v. *Illinois Institute of Technology,* 384 F.Supp. 202, 205 (N.D. Ill., 974). *See also Nelson Radio & Supply Co.* v. *Motorola,* 200 F.2d 911, 914 (5 Cir., 1952), *cert. denied,* 345 U.S. 925 (1953), for a discussion of the conspiracy concept in an antitrust context.

Of the numerous authorities plaintiff cites, we find only *Rackin* v. *University of Pennsylvania,* 386 F.Supp. 992 (E.D. Pa., 1974) worthy of discussion.[5] In *Rackin,* plaintiff alleged sex discrimination by the University, its officers, and certain tenured faculty members. The district court found the *Dombrowski* rationale inapplicable to the facts of the case because of the continuing and varied instances of discrimination and harassment: not only was plaintiff given tenure in a department other than the one in which

5. Among others, plaintiff also cites *Pendrell* v. *Chatham College,* 370 F.Supp. 494 and 386 F.Supp. 341 (W.D. Pa., 1974) and *Westberry* v. *Gilman Paper Company,* 507 F.2d 206 (5 Cir. 1975), in support of her conspiracy claim. The decision in *Pendrell* is not instructive regarding the conspiracy element of a §1985(3) claim. The two district court opinions in *Pendrell* focused on the state action aspect of a §1983 claim against a private university and whether plaintiff satisfied the second element of a §1985(3) claim, which is not at issue here. Insofar as the conspiracy aspect of a §1985(3) claim is concerned, the district court merely stated that "[h]er complaint clearly alleges that the 'defendants, some or all of them, conspired and acted in concert pursuant to a common scheme . . .', thus satisfying element (1) [conspiring] of *Griffin.*" *Pendrell* v. *Chatham College, supra,* 370 F.Supp. at 500. Because there is no analysis, it is difficult to assign much weight to this finding.

Westberry v. *Gilman Paper Company, supra,* 507 F.2d at 216, was withdrawn after a rehearing *en banc* with orders to the district court to dismiss as moot, "so that it will spawn no legal precedents."

it was earned, a decision clearly contrary to normal university policy, but subsequently she had been assigned only freshmen courses outside her area of specialty. The court found that these actions, more than a single decision by one business entity, supported a conspiracy allegation. 386 F.Supp. at 1005.

The situation at the University of Pennsylvania was unlike the situation here. Here there is but one single business entity with a managerial policy implemented by the one governing board, while at the University of Pennsylvania, each department had its own disparate responsibilities and functions so that the actions complained of by the plaintiff were clearly not actions of only one policymaking body but of several bodies; thus the court correctly held that the allegations supported a claim of conspiracy among them. Here plaintiff's allegations of multiple acts by the directors are not alleged to be other than the implementation of a single policy by a single policymaking body. Indeed, defendants here would seem to be safely within the area of the *Dombrowski* decision and quite outside that of *Rackin*.

In the instant case, the individual defendants comprise the board of directors through which the corporation acted. The lease agreement specifically required the consent of the board before any transfer of ownership interest could be effective. In claiming that defendants advised the board and president to deny her continued occupancy, refused to permit a personal appearance, provide her with minutes, accept payments or a debt guarantee and commenced legal action, plaintiff does not allege that any of the individual

defendants acted in any other capacity than his official role of director. As found by the court below,

> "Although the decision plaintiff challenges reflected the collective judgment of 'two or more persons,' the decision cannot be considered the product of a conspiracy when the board was merely carrying out the corporation's managerial policy." 396 F.Supp. at 455-56.

Plaintiff next argues that defendants conspired by maliciously telephoning her at unreasonable hours in order to harass her into giving up her struggle to maintain occupancy. Again, plaintiff does not assert that the individual defendants were acting other than as officers and directors; the complaint identifies them only by their corporate status. The fact that they were also shareholders and tenants of apartments in the defendant-corporation's building does not aid plaintiff's case, since she did not allege that the individual defendants were motivated by any independent personal stake in achieving the corporation's objective. In *Cole* v. *University of Hartford*, 391 F.Supp. 888, 893 (D. Conn., 1975) the court stated that

> "[s]imply joining corporate officers as defendants in their individual capacities is not enough to make them persons separate from the corporation in legal contemplation. The plaintiff must also allege that they acted other than in the normal course of their corporate duties. . . . '[I]t is not alleged that the individual defendants committed any act of a personal nature except in connection with the corporate affairs.'"

Accordingly, we hold that plaintiff's §1985(3) claim must be dismissed for failure to state an actionable conspiracy under the statute.

BLEED THROUGH

III. *Plaintiff's State Claim*

Plaintiff also alleged a violation of New York Executive Law §296(5)(a)(1). However, since we have dismissed plaintiff's federal claims for failure to state a cause of action, we will avoid making "[n]eedless decisions of state law" and, exercising our discretion, dismiss her pendent state claim. *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 726 (1966).

Finally, the Court need not decide what effect the prior state court decision would have had upon the present action under the doctrine of *res judicata.*

The order of the district court is affirmed.

Dissenting Opinion, Oakes, C. J.

OAKES, *Circuit Judge* (dissenting):

I respectfully dissent.

In my view the complaint alleges facts which are sufficient to state a substantial claim under 42 U.S.C. §1985(3). Since appellant has also raised a claim under the laws of New York, we have pendent jurisdiction over the state law claim so long as "the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 725 (1966). *See also Van Gemert* v. *Boeing Co.*, 520 F.2d 1373, 1382 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3272 (U.S. Nov. 11, 1975).[1] Appellant's complaint cites New York Executive Law §296(5)(a)(1) (McKinney 1974) as the source of her state law claim.[2] However, this section of the New York Human Rights Law is not enforceable in federal court, but is part of an adminis-

1. *See also Rosado* v. *Wyman*, 397 U.S. 397, 404 (1970); *Bell* v. *Hood*, 327 U.S. 678 (1946); *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103, 105 (1933).

2. At the time appellant filed this action, New York Executive Law §296(5)(a)(1) provided:

> (a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:
>
> (1) To refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color, national origin or sex, or disability of such person or persons.

Paragraph (1) has since been amended to include the words "or marital status" after the word "disability."

BLEED THROUGH

trative scheme which is administered by the state Division of Human Rights. The Division investigates complaints, has hearings and issues orders upon complaints filed by persons who claim their rights have been violated. *Id.* §297. These orders are subject to judicial review in the state courts. *Id.* §298. Obviously the federal courts cannot take jurisdiction over the state remedy with its administrative procedures, exhaustion of which is essential.

But New York Civil Rights Law §19-a (McKinney 1975-1976 Supp.) provides a basis for a pendent state claim which is inherent in the appellant's pleaded allegations. That section provides that

> No corporation formed for the purpose of the cooperative ownership of real estate within the state shall withhold its consent to the sale or proposed sale of certificates of stock or other evidence of ownership of an interest in such corporation because of the race, creed, national origin, or sex of the purchaser.

Id. It is obvious that the claim arising under this state statute[3] has the same "common nucleus of operative fact" as appellant's federal claim. Therefore, "considerations of judicial economy, convenience and fairness to the litigants," *United Mine Workers of America* v. *Gibbs, supra,* 383 U.S. at 726, appear at this stage of the case to weigh in favor of resolution of the state claim in the federal court proceedings.

It is well to remember that federal jurisdiction is conferred here by 28 U.S.C. §1343(1), (3), (4), and 28 U.S.C.

3. New York Civil Rights Law §19-b (McKinney 1975-1976 Supp.) provides that "[a]ny person aggrieved by a violation of section nineteen-a . . . shall have a right of action in any court of appropriate jurisdiction to restrain such violation and for other equitable remedies, including such affirmative and other relief as may be necessary to undo the effects of such violation."

§1331(a).[4] Resort is had to 42 U.S.C. §1985(3) only to determine whether a claim is stated thereunder, since it creates the cause of action. *See McNeese* v. *Board of Education,* 373 U.S. 668, 671 & n.1 (1963) (§1983 action); *Byrd* v. *Sexton,* 277 F.2d 418 (8th Cir.) (Blackmun, Circuit Judge), *cert. denied,* 364 U.S. 818, 819 (1960); *Campbell* v. *Glenwood Hills Hospital, Inc.,* 224 F. Supp. 27, 29 (D. Minn. 1963).

Where, as here, allegations in a complaint are sufficient to state a §1985(3) conspiracy claim, the trial court may resolve both the §1985(3) claim and the state claim, or, which may be preferable, avoid resolving the §1985(3) claim on the merits if the pendent state claim permits disposition of the case. Here, as in *Siler* v. *Louisville & Nashville Railway Co.,* 213 U.S. 175, 191 (1909), once a federal question is substantially alleged, the court has

> the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.

To put it another way, resolution of the state law claim here alone is proper, and would permit avoidance of an "avoidable" decision under federal civil rights law. *See* P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System

4. Probably §§1331(a) and 1343(1) are the most applicable, §1331(a) because the jurisdictional amount test is clearly satisfied and it is property rights of which appellant claims to be deprived, *see Hague* v. *CIO,* 307 U.S. 496, 518-32 (1939); Note, *Jurisdictional Amount in Civil Rights Cases,* 9 U. Chi. L. Rev. 302 (1942), and §1343(1) because it is the jurisdictional counterpart to 42 U.S.C. §1985(3). Moreover, unlike §1343(3), neither §1331(a) nor §1343(1) contains a requirement of infringement of rights under "color of state law." *See Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 547 (1972).

(2d ed. 1973) at 922-23; C. Wright, Law of Federal Courts (1970) §19, at 62-65. *See generally* Note, *UMW* v. *Gibbs and Pendent Jurisdiction,* 81 Harv. L. Rev. 657 (1968).

The complaint names three individual defendants as well as the corporate defendant and alleges that they have conspired with each other to deprive appellant of her civil and property rights. The court below found that appellant's complaint did not state a claim under §1985(3) because the court interpreted the complaint as failing to assert that the individual defendants were acting outside their official capacity as directors of the defendant corporation. Thus, the court reasoned, the actions of the individual defendants "cannot be considered the product of a conspiracy when the board was merely carrying out the corporation's managerial policy." 396 F. Supp. 450, 456.

It is, to be sure, basic conspiracy law that a corporation cannot conspire with its agents or employees acting within the scope of their employment, *Pearson* v. *Youngstown Sheet & Tube Co.,* 332 F.2d 439 (7th Cir.), *cert. denied,* 379 U.S. 914 (1964). And it has been said that if the conspiratorial conduct challenged is essentially a "single act of discrimination by a single business entity," the fact that two or more agents participated in the decision or act will "normally not constitute" a §1985(3) conspiracy. *Dombrowski* v. *Dowling,* 459 F.2d 190, 196 (7th Cir. 1972). But here the individual defendants were not alleged to be simply agents or employees of the corporate defendant, nor to be acting in the scope of their employment, nor to be acting for the corporate benefit. A closer reading of the complaint indicates that appellant explicitly alleges that the injurious acts of the individual defendant conspirators were indeed committed in their individual, not their corporate, capacities.

Here the complaint alleges that the individual defendants "constitute the officers and the entire Board of Directors of the corporate defendant, and *wholly dominate, operate and control all of its business and financial affairs.*" (Emphasis added.) These allegations alone serve to distinguish this case from *Dombrowski, supra.* As recognized by Judge McMillen in *Cohen* v. *Illinois Institute of Technology*, 384 F. Supp. 202, 205 (N.D. Ill. 1974), the case is entirely different when the individual officers or directors are "alleged to have controlled [the corporate defendant] or to have personally committed acts of discrimination. . . ."[5] In such a case, as here, the individuals are not acting at the direction of their corporate employer or necessarily for its benefit.

Further, the complaint alleges that the defendants, "in furtherance of the said design and conspiracy,"

> [a]dvised, caused, permitted and allowed the President and the Board of Directors of the corporate defendant to deny plaintiff permission and authority to continue occupancy of the subject premises.

Surely the implication of such an allegation is not that the defendants in their capacity as corporate agents advised themselves to act in their capacity as corporate agents. Rather, it is that defendants in their individual capacities determined according to personal motives that they would cause managerial action by the president and the board of directors to serve their individual interests. The crux of this allegation is that defendants acted, albeit

5. While in *Baker* v. *Stuart Broadcasting Co.*, 505 F.2d 181, 183 (8th Cir. 1974), two of the three named individual defendants owned 100 per cent of the stock of the corporation, the nature of this ownership or its relevance to the alleged conspiracy was not discussed. The decision cannot therefore be deemed illuminating on this point.

behind the screen of their corporate roles, in an individual and not an official capacity.

Here, indeed, the complaint also alleges that "the purpose, intent and result" of the conspiracy "was to enable, permit and allow the said defendants to receive for their own use and benefit and not for the benefit of plaintiff the sole and exclusive right to determine who shall own said shares of stock and the proprietary lease in the subject premises. . . ." (Emphasis added.) As shareholders in the cooperative corporation and as leaseholders in the building it would be to their individual financial benefit to have the Girard apartment revert to the corporation and it might very well be to their personal benefit to acquire the apartment for themselves. These allegations as to personal motives alone further serve to distinguish this case from the corporate-agent cases referred to above. *See Nelson Radio & Supply Co.* v. *Motorola*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

Moreover, acts engaged in as a part of the conspiracy by defendants allegedly include deliberate and malicious "telephone calls to plaintiff at unreasonable hours solely for the purpose of harassing and annoying her in order to force plaintiff to vacate said premises. . . ." Such conduct, if established, would surely be individual and noncorporate in nature; nor are these allegations to be lightly disregarded or passed off as being de minimis. *Cf. Rackin* v. *University of Pennsylvania*, 386 F. Supp. 992 (E.D. Pa. 1974).

All of these factors in my view make the question whether the alleged §1985(3) conspiracy existed one that certainly is substantial, so as to supply, even if it does not succeed on its own merits, clear pendent jurisdiction of the state law claim.

There is, to be sure, another question, left open in *Griffin* v. *Breckinridge*, 403 U.S. 88, 102 n.9 (1971), "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable" under §1985(3). A series of recent Supreme Court cases, perhaps the foremost of which is *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), point the way toward an affirmative answer in cases involving bias on account of sex. One would estimate that deprival of valuable property rights on account of a person's gender would constitute a denial "of the equal protection of the laws" within §1985(3), as well as within the Fourteenth Amendment. *See Stanton* v. *Stanton*, 421 U.S. 7 (1975); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

There is, in short, a claim under this federal civil rights statute to warrant federal jurisdiction under 28 U.S.C. §1331(a) or §1343(1), and under the principles of pendent jurisdiction above enumerated clearly to support consideration of the state law claim under the New York Civil Rights Law. I would reverse and remand for that consideration.[6]

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6. Appellees have argued that this suit is barred by the res judicata effect of a prior state court action brought by appellant against these same appellees. In the state court litigation, however, appellant merely contended that the appellees' refusal to assign to her the shares of the corporation owned by her former husband was in breach of the lease agreement and state corporations law. No violation of civil rights was alleged in the state court action, and the state judge, in ruling against appellant's claim, stated only that appellees have the right to refuse to consent to the transfer of a cooperative lease for any reason "except, of course, those prohibited by the Civil Rights Law." *Girard* v. *94th Street and Fifth Avenue Corp.*, Civ. No. 15173/73 (Supreme Court, New York County, July 8, 1974) (memorandum opinion). Only the other day, in *Herendeen* v. *Champion International Corp.*, No. 75-7083 (2d Cir. Nov. 10, 1975), slip op. 483, we held under New York law that where a plaintiff in a second suit sets forth "an independent claim of defendant wrongdoing" the first suit does not bar the second even though the plaintiff "could have joined" the second suit claim with the first. *Id.* at 489-91. While Mrs. Girard could have joined her civil rights claim in her state court suit she did not do so. She is not barred, therefore, from asserting it now.

BLEED THROUGH

APPENDIX III

Stay of Mandate of Second Circuit

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

75-7443

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of February, one thousand nine hundred and seventy-six.

BARBARA GIRARD,

Plaintiff-Appellant,

v.

94TH STREET AND FIFTH AVENUE CORPORATION, LAWRENCE WILKINSON, JOHN H. STOOKEY and THOMAS E. MURRAY,

Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellant dated January 28, 1976 to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted, provided said application is filed within 30 days from the date of filing of this order, in default of which mandate shall issue.

/s/ STERRY R. WATERMAN

STERRY R. WATERMAN

/s/ JAMES L. OAKES

JAMES L. OAKES

/s/ THOMAS J. MESKILL

THOMAS J. MESKILL

Circuit Judges